

**UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
LAFAYETTE-OPELOUSAS DIVISION**

UNITED STATES OF AMERICA

CRIMINAL ACTION NO. 06-60006

VERSUS

JUDGE MELANÇON

MEHMOOD M. PATEL

MAGISTRATE JUDGE METHVIN

ORDER

Before the Court is the defendant's Motion for Bail Pending Appeal and Incorporated Memorandum of Authorities [Rec. Doc. 317]. In *United States v. Valera-Elizondo*, 761 F.2d 1020 (5th Cir. 1985), the United States Court of Appeals for the Fifth Circuit annunciated a four part test to determine whether a convicted and sentenced defendant is entitled to bond pending appeal pursuant to 18 U.S.C. §3143(b). In that case, the Court stated that the defendant has the burden of proving:

- (1) that he is not likely to flee or pose a danger to the safety of any other person or the community if released;
- (2) that the appeal is not for the purposes of delay;
- (3) that the appeal raises a substantial question of law or fact; and
- (4) that if that substantial question is determined favor to defendant on appeal, that decision is likely to result in reversal or an order for a new trial of all counts on which imprisonment has been imposed.

Valera-Elizondo, 761 F.2d at 1025 (citing *United States v. Giancola*, 754 F.2d 898, 901 (11th Cir. 1985) and *United States v. Miller*, 753 F.2d 19, 24 (3rd Cir. 1985)).

As the Court made the finding at the June 4 sentencing hearing that the defendant is not likely to flee and does not pose a danger to any person or the community, the analysis of defendant's current motion will focus on the remaining elements.

The Court finds that the defendant's appeal is in good-faith and is not for the purposes of delay. However, the Court cannot find that the appeal raises a "substantial question" of law or fact. In *Valera-Elizondo*, the Fifth Circuit, following the Eleventh Circuit, stated that a "substantial question" is ". . . a 'close' question or one that very well could be decided the other way." *Valera-Elizondo*, 761 F.2d at 1024. Whether a question is substantial must be decided on a case-by-case basis, and the lack of a controlling precedent is but one factor to consider. *Id.* The Fifth Circuit further explained that ". . . a 'substantial question' means that the issue presented must raise a substantial doubt (not merely a fair doubt) as to the outcome of its resolution." *Id.*

Here, the defendant cites the arguments raised in his various motions filed before, during, and after trial as evidence that a "substantial question" exists in this case. Defendant raises no new arguments in the motion *sub judice*. A review of defendant's motions and arguments reveals that none of the arguments advanced present novel issues or close questions for resolution. In its June 3, 2009 Memorandum Ruling [Rec. Doc. 307] and Order [Rec. Doc. 308], the Court relied on controlling and long-standing jurisprudential, statutory, and constitutional authorities to resolve each and every issue presented.¹ Based on the Court's ruling, there is no fair doubt, much less substantial doubt, as to the outcome of the resolution of the issues presented.

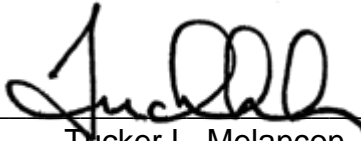
¹ Defendant argues that the constitutionality of 18 U.S.C. §1347 is a novel issue in the Fifth Circuit raised for the first time in his Motion to Dismiss [Rec. Doc. 95]. However, as set out by Magistrate Judge Methvin in her Report and Recommendations [Rec. Doc. 131] on the motion, as adopted by the District Court [Rec. Doc. 138], this is not a novel issue and ". . . relevant case law is replete with instances of health care fraud committed in the same manner as that alleged here: the performance of medically unnecessary procedures which are then billed to a health care program." *Report and Recommendations* [Rec. Doc. 131], pg. 6. Further, were this a novel issue in the Fifth Circuit, that fact alone would be insufficient to present a "substantial question" as other circuits have addressed the issue and there is ". . . no real reason to believe that this circuit would depart from unanimous resolution of the issue by other circuits." *Valera-Elizondo*, 761 F.2d at 1024 (*quoting Giancola*, 754 F.2d at 901).

Having determined that no “substantial question” exists in this case, it is unnecessary to consider the final element of the test. Having failed to establish a required element for relief, the defendant is not entitled to bond pending appeal pursuant to 18 U.S.C. §3143(b). Accordingly, it is

ORDERED that defendant’s Motion for Bail Pending Appeal [Rec. Doc. 317] is **DENIED**.

IT IS FURTHER ORDERED that defendant’s alternative request for a stay of his surrender date of July 6, 2009 is **DENIED**. Per order of this Court on June 4, 2009, defendant is to report to the Bureau of Prisons no later than July 6, 2009.

THUS DONE AND SIGNED this 18th day of June, 2009 at Lafayette, Louisiana.



Tucker L. Melançon
United States District Judge